

Robert M. Barta (SBN: 108205)
rbarta@bartagoldberg.com
BARTA | GOLDBERG
1801 Century Park East, Suite 1200
Los Angeles, California 90067
Telephone: (310) 479-1454
Facsimile: (310) 478-1439

Attorneys for Defendant
Leonardo DiCaprio

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

GLOBAL WEATHER PRODUCTIONS,
LLC,

Plaintiff,

v.

LEONARDO DICAPRIO,

Defendant.

Case No. 2:23-CV-09279-ODW-SSC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT’S RULE 12(B)(6)
MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED**

Honorable Otis D. Wright II

Date: October 28, 2024

Time: 01:30 p.m.

Ctrm: 5D

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	PLAINTIFF’S ALLEGATIONS.....	2
III.	STANDARD ON A 12(B)(6) MOTION TO DISMISS	4
IV.	THE DISPLAY OF THE VIDEO WAS “FAIR USE” UNDER THE COPYRIGHT ACT AND NOT AN INFRINGEMENT	5
A.	The Purpose and Character of the Use Weighs in Favor of Fair Use Because It Was for Nonprofit Education Purposes and Transformed the Character of the Video	7
B.	The Nature of the Video is Informational and It Was Previously Published	12
C.	The Portion of the Work Used in Was Justified and Necessary for the Purpose of the Use	14
D.	There Has Been No Alleged or Likely Effect of the Use on the Potential Market for or Value of the Video	15
V.	CONCLUSION	17

TABLE OF AUTHORITIES

CASES

<i>American Society of Cinematographers v. Schatz</i> , No. 220CV08607ODWJCX, 2021 WL 4352302 (C.D. Cal., May 25, 2021).....	9, 14
<i>Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith</i> , 598 U.S. 508 (2023)	11
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	4
<i>Brownmark Films, LLC v. Comedy Partners</i> , 682 F.3d 687 (7th Cir. 2012).....	4, 7
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 510 U.S. 569 (1994).....	6, 7, 9, 11, 14, 15
<i>City of Inglewood v. Teixeira</i> , No. CV1501815MWFMRWX) 2015 WL 5025839 (C.D. Cal., Aug. 20, 2015)	9, 13
<i>Dr. Seuss Enterprises, L.P. v. ComicMix LLC</i> , 983 F.3d 443 (9th Cir. 2020)	10, 14
<i>Duckhole Inc. v. NBC Universal Media LLC</i> , CV–12–10077–BRO, 2013 WL 5797279 (C.D. Cal. Sept. 6, 2013)	4
<i>Fisher v. Dees</i> , 794 F.2d 432 (9th Cir. 1986).....	7
<i>Gompper v. VISX, Inc.</i> , 298 F.3d 893 (9th Cir. 2002).....	4
<i>Harper & Row, Publishers, Inc. v. Nation Enters.</i> , 471 U.S. 539 (1985).....	6
<i>Hustler Magazine Inc. v. Moral Majority Inc.</i> , 796 F.2d 1148 (9th Cir. 1986)	5, 9
<i>Kelly v. Arriba Soft Corp.</i> , 336 F.3d 811 (9th Cir. 2002).....	6, 14
<i>Leadsinger, Inc. v. BMG Music Pub.</i> , 512 F.3d 522 (9th Cir. 2008)	7
<i>Mattel, Inc. v. Walking Mountain Prods.</i> , 353 F.3d 792 (9th Cir. 2003)	5
<i>MCA, Inc. v. Wilson</i> , 677 F.2d 180 (2d Cir. 1981).....	9
<i>McGucken v. Pub Ocean Limited</i> , 42 F.4th 1149 (9th Cir. 2022).....	10
<i>Monge v. Maya Mags.</i> , 688 F.3d 1164 (9th Cir. 2012)	12
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)..	6, 7, 8, 9, 10, 14

1	<i>Savage v. Council on American-Islamic Relations, Inc.</i> , C 07-6076 SI, 2008 WL	
2	2951281 (N.D. Cal. Jul. 25, 2008)	7, 15
3	<i>Seltzer v. Green Day, Inc.</i> 725 F.3d 1170 (9th Cir. 2013).....	9
4	<i>Sprewell v. Golden State Warriors</i> , 266 F.3d 979 (9th Cir. 2001).....	4
5	<i>Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n</i> , 953 F.3d 638	
6	(9th Cir. 2020)	9
7	<i>Wright v. Assoc. Ins. Cos. Inc.</i> , 29 F.3d 1244 (7th Cir. 1994).....	4, 7
8	STATUTES	
9	17 U.S.C. § 106.....	5
10	17 U.S.C. § 107.....	5, 6, 7, 10, 12, 14, 15, 16
11	F.R.C.P. 12(b)(6)	3, 4
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

I. INTRODUCTION

Plaintiff Global Weather Productions, LLC (“Plaintiff”) claims that it is the copyright owner of an aerial video showing damage caused by Hurricane Dorian to the Abaco islands in the Bahamas in 2019 (“Video”), and that Defendant Leonardo DiCaprio (“DiCaprio”) infringed on Plaintiff’s copyright by using the Video in an Instagram post (“Post”) about increasing effects of climate change. However, the use of the Video in the Post falls squarely within the Copyright Act’s statutory exception of “fair use.” The Post was a commentary and educational statement on climate change, stating in part, “As climate change continues to heat up our oceans and air, storms like Atlantic hurricanes will only become stronger and more destructive.” The greater context of the account on which the Post was made (“Account”), which is used mostly for DiCaprio’s environmentalist efforts, confirms the purpose and the transformative and educational nature of the Post. See images of the Account, Leonardo DiCaprio (@leonardodicaprio), INSTAGRAM, <http://instagram.com/leonardodicaprio/> (last visited October 10, 2024), attached to the Declaration of Robert M. Barta (“Barta Decl.”) as Exhibit A, depicting the Account’s bio description and thumbnails of the most recent posts on the account, as well as thumbnails of posts made during the period immediately before and after September 4, 2019, all of which demonstrate an educational and non-commercial nature, purpose and use of the Account. Because the alleged use of the Video was fair

1 use, not an infringement of copyright, Plaintiff's Complaint, which would hinder the
2 sharing of educational information about climate change to the public, should be
3 dismissed.
4

5 **II. PLAINTIFF'S ALLEGATIONS**

6 As relevant to this Motion, Plaintiff alleges the following in its Complaint:
7
8 Michael Brandon Clement ("Clement") created the Video showing a helicopter view
9 of the damage caused by Hurricane Dorian to the Abaco islands in the Bahamas.
10 Plaintiff's Complaint, ECF No. 1 ("Compl.") 2. Clement created the Video with the
11 intention of it being used commercially and for the purpose of display and/or public
12 distribution. *Id.* 17. In creating the Video, Clement personally selected the subject
13 matter, timing, lighting, angle, perspective, depth, lens and camera equipment used to
14 capture the video recording. *Id.* 15. On September 25, 2019, the Video was registered
15 by the United States Copyright Office. *Id.* 16. On or about June 4, 2023, Plaintiff
16 acquired the rights in and to the Video from Clement by way of written assignment.
17
18 *Id.* 18.
19

20
21 DiCaprio is an actor and film producer who owns and operates the Instagram
22 Account with the name @leonardodicaprio. *Id.* 3, 19, 20. Plaintiff alleges that the
23 Account is "a key component of DiCaprio's popular and lucrative enterprise." *Id.* 21.
24

25 On or about September 4, 2019, the Account displayed the Video as part of the
26 Instagram Post without Plaintiff's permission (notwithstanding that the Complaint
27
28

1 reflects that Plaintiff had no rights to the Video at that time). *Id.* 23. Plaintiff alleges
2 that an exact copy of the original Video recording was copied and displayed on the
3 Account. *Id.* 23, 27.
4

5 However, as reflected in Exhibit 2 to Plaintiff's Complaint, the video in the
6 Post is watermarked with the logo of CNN in the upper left corner and it contains the
7 words "GREAT ABACO ISLAND, BAHAMAS / BRANDON CLEMENT/LSM,"
8 establishing that the video posted on the Account was not an exact copy of the
9 original. The Post also includes the following statement by the Account:
10
11

12 "As climate change continues to heat up our oceans and air, storms
13 like Atlantic hurricanes will only become stronger and more
14 destructive. #Regram #RG @cnn: This aerial footage of the Bahamas
15 shows the devastation left by Hurricane Dorian on Great Abaco
16 Island. Dangerous winds and life-threatening storm surge were
expected to continue through Tuesday evening. Dorian was expected
to skirt the east coast of Floria as it crawls north."

17 *Id.* Ex. 2.
18

19 Plaintiff alleges that DiCaprio received a financial benefit directly attributable
20 to the alleged infringement, which increased traffic to the Account. *Id.* 34, 35. A large
21 number of people have viewed the unlawful copy of the Video on the Account. *Id.* 36.
22 Plaintiff further alleges that the use of the Video harmed the actual market for the
23 Video, and that this use of the Video, if widespread, would harm Plaintiff's potential
24 market for the Video. *Id.* 38, 39.
25
26
27
28

1 **III. STANDARD ON A 12(B)(6) MOTION TO DISMISS**

2 With this Motion, DiCaprio asks the Court to dismiss the Complaint for failure
3 to state a claim upon which relief can be granted. In deciding Rule 12(b)(6) motions,
4 courts must construe complaints in the light most favorable to the plaintiffs, accept all
5 allegations of material fact as true, and draw all reasonable inferences from well-
6 pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002);
7 *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), amended on
8 denial of reh’g, 275 F.3d 1187 (9th Cir. 2001). However, a court need not blindly
9 accept conclusory allegations, unwarranted deductions of fact, and unreasonable
10 inferences. *Id.* at 988. The court is not required to accept as true legal conclusions
11 couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “A
12 pleading that offers...‘a formulaic recitation of the elements of a cause of action will
13 not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of
14 ‘further factual enhancement.’” *Id.* (citations omitted).

15 In addition, “[i]t is well settled that in deciding a Rule 12(b)(6) motion, a court
16 may consider ‘documents attached to a motion to dismiss ... if they are referred to in
17 the plaintiff’s complaint and are central to his claim.’” *Brownmark Films, LLC v.*
18 *Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012) (quoting *Wright v. Assoc. Ins.*
19 *Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994)) (holding that district could properly
20 dismiss copyright claim on motion to dismiss on the basis of a fair use defense); *see*
21

1 *also Duckhole Inc. v. NBC Universal Media LLC*, CV–12–10077–BRO, 2013 WL
2 5797279, at *3 (C.D. Cal. Sept. 6, 2013) (considering copies of accused infringing
3 episodes as properly judicially noticed, despite not being attached plaintiff's
4 pleadings). Here, Plaintiff refers throughout the Complaint to the Account on which
5 the Post was made. *See* Compl. 3, 19-21, 34, 35. Indeed, Plaintiff relies on
6 DiCaprio's ownership and the context and use of the Account in his allegations of
7 damages. *Id.* Accordingly, the Account should be considered in addition to the Post
8 itself. Accordingly, DiCaprio requests that the Court consider the Account when
9 evaluating this Motion to Dismiss. The full Account can be viewed at
10 <https://www.instagram.com/leonardodicaprio/?hl=ar>, and screenshots of the
11 Account's bio and exemplary posts are collectively attached to the Barta Declaration
12 as Exhibit A.

17 **IV. THE DISPLAY OF THE VIDEO WAS "FAIR USE" UNDER THE**
18 **COPYRIGHT ACT AND NOT AN INFRINGEMENT**

19 DiCaprio moves to dismiss Plaintiff's claim for copyright infringement on the
20 ground that the display of a version of the Video was a fair use under the Copyright
21 Act. "The Copyright Act, 17 U.S.C. § 106, protects the owner of a copyright by
22 granting him or her exclusive rights to reproduce, distribute, and publicly display
23 copies of the work." *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 799 (9th
24 Cir. 2003) (internal quotation marks omitted). However, the Copyright Act recognizes
25 certain statutory exceptions to the copyright owner's exclusive rights, including the
26
27
28

1 “fair use” exception. 17 U.S.C. §§ 106, 107; *see Hustler Magazine Inc. v. Moral*
2 *Majority Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986).

3
4 “The fair use doctrine confers a privilege on people other than the copyright
5 owner to use the copyrighted material in a reasonable manner without his consent,
6 notwithstanding the monopoly granted to the owner.” *Id.* (internal quotation marks
7 omitted). The Copyright Act provides that the “fair use of a copyrighted work,
8 including such use by reproduction in copies or phonorecords or by any other means
9 ... for purposes such as criticism, comment, news reporting, teaching, ... scholarship,
10 or research, is not an infringement of copyright.” 17 U.S.C. § 107.

13 When determining whether a use constitutes a “fair use,” courts consider
14 several factors, including (1) the purpose and character of the use, including whether
15 the use is commercial or for non-profit educational purposes, (2) the nature of the
16 copyrighted work, (3) the amount and substantiality of the portion of the work used
17 in relation to the work as a whole, and (4) the effect of the use on the potential market
18 for or value of the work. *Id.*; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-
19 77 (1994). “We must be flexible in applying a fair use analysis; it ‘is not to be
20 simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls
21 for case-by-case analysis.... Nor may the four statutory factors be treated in isolation,
22 one from another. All are to be explored, and the results weighed together, in light of
23 the purposes of copyright.’” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,
24
25
26
27
28

1 1163 (9th Cir. 2007) (citing *Campbell*, 510 U.S. at 577–78; *Kelly v. Arriba Soft*
2 *Corp.*, 336 F.3d 811, 817-18 (9th Cir. 2002)).

3
4 Even though the analysis of fair use is a mixed question of law and fact
5 (*Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985)), a court
6 may properly dismiss a copyright claim on a motion to dismiss on the basis of a fair
7 use defense. *See Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 529 (9th Cir.
8 2008); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012)
9 (quoting *Wright v. Assoc. Ins. Cos. Inc.*, 29 F.3d 1244, 1248 (7th Cir. 1994)); *Savage*
10 *v. Council on American-Islamic Relations, Inc.*, C 07-6076 SI, 2008 WL 2951281, *9
11 (N.D. Cal. Jul. 25, 2008) (dismissing copyright claim on a motion for judgment on
12 the pleadings based on finding of fair use); *Fisher v. Dees*, 794 F.2d 432, 435-36 (9th
13 Cir. 1986) (finding fair use where the operative facts were undisputed or assumed; the
14 court is to make fair use judgments, which “are legal in nature”).
15
16
17
18

19 **A. The Purpose and Character of the Use Weighs in Favor of Fair Use**
20 **Because It Was for Nonprofit Education Purposes and Transformed**
21 **the Character of the Video**

22 The first factor in a fair use inquiry is “the purpose and character of the use,
23 including whether such use is of a commercial nature or is for nonprofit educational
24 purposes.” 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 578. This factor addresses
25 “whether the new work merely ‘supersedes the objects’ of the original creation, or
26 instead adds something new, with a further purpose or different character, altering the
27
28

1 first with new expression, meaning or message; it asks, in other words, whether and
2 to what extent the new work is ‘transformative.’” *Id.* at 579-80 (1994) (internal
3 citations omitted); 17 U.S.C. § 107(1); *see also Perfect 10, Inc.*, 508 F.3d at 1164-65
4 (“a search engine puts images ‘in a different context’ so that they are ‘transformed
5 into a new creation’”).
6

7
8 The Ninth Circuit makes two inquiries for this factor. *See Kelly*, 336 F.3d at
9 818. The first inquiry is whether the use of the work is commercial in nature. *Id.* at
10 818. A commercial or profit-making purpose tends to weigh against a finding of fair
11 use. *Harper & Row Publishers, Inc.*, 471 U.S. at 562. “The crux of the
12 profit/nonprofit distinction is not whether the sole motive of the use is monetary gain
13 but whether the user stands to profit from exploitation of the copyrighted material
14 without paying the customary price.” *Id.*
15

16
17 Here, the Post, viewed independently and in the context of the other posts on
18 the Account, is plainly intended to inform and educate viewers as to the effects of
19 climate change, as the many other posts by the Account also address environmental
20 issues. *See Barta Decl. Ex. A.* Nothing about the Post is commercial in nature; the
21 Post does not attempt to promote or sell any product or business. The fact that the
22 Account is owned by a celebrity does not make the subject Post commercial in
23 nature. Accordingly, the educational purpose of the use of the Video would weigh in
24 favor of a finding of fair use.
25
26
27
28

1 The second inquiry is determining whether the use of the work is
2 transformative. *Kelly*, 336 F.3d at 818. A use is considered transformative only where
3 a party changes a copyrighted work or uses the copyrighted work in a different
4 context such that the work is “transformed into a new creation.” *Perfect 10, Inc.*, 508
5 F.3d at 1165; accord *American Society of Cinematographers v. Schatz*, No.
6 220CV08607ODWJCX, 2021 WL 4352302, at *3 (C.D. Cal., May 25, 2021). While
7 transformation is not necessary for a finding of fair use, the goal of copyright
8 protection is “generally furthered by the creation of transformative works.”
9 *Campbell*, 510 U.S. at 579. The more transformative the new work, the less will be
10 the significance of other factors, like commercialism, that may weigh against a
11 finding of fair use. *Id.*; see also *Hustler Magazine Inc.*, 796 F.2d at 1152 (“Even
12 assuming that the use had a purely commercial purpose, the presumption of
13 unfairness can be rebutted by the characteristics of the use”); accord *City of*
14 *Inglewood v. Teixeira*, No. CV1501815MWFMRWX) 2015 WL 5025839, at *8 (C.D.
15 Cal., Aug. 20, 2015). When the use has both commercial and non-profit
16 characteristics, the court may consider “whether the alleged infringing use was
17 primarily for public benefit or for private commercial gain.” *Hustler Magazine Inc.*,
18 796 F.2d at 1153 (citing *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).

19
20
21 “Works are transformative when ‘new expressive content or message is
22 apparent,’ even if ‘the allegedly infringing work makes few physical changes to the
23
24
25
26
27
28

1 original or fails to comment on the original.’ ” *Tresóna Multimedia, LLC v. Burbank*
2 *High Sch. Vocal Music Ass’n*, 953 F.3d 638, 649 (9th Cir. 2020) (quoting *Seltzer v.*
3 *Green Day, Inc.* 725 F.3d 1170, 1177 (9th Cir. 2013). The Ninth Circuit has
4 consistently held that “making an exact copy of a work may be transformative so
5 long as the copy serves a different function than the original work[.]” *Perfect 10, Inc.*,
6 508 F.3d at 1165 (image originally used for entertainment or aesthetic purposes was
7 transformed where defendant used the same image to facilitate use of an internet
8 browser to locate information on the web); *see also Kelly*, 336 F.3d at 816 (“exact
9 replication” of protected images was fair use where used in a different context from
10 the original).

11
12 As explained in *McGucken v. Pub Ocean Limited*,

13
14 “[T]he word ‘transformative’ ... describe[s] a copying use that
15 adds something new and important.” Google, 141 S. Ct. at
16 1203. The “benchmarks” of transformative use are “(1) further
17 purpose or different character in the defendant's work, i.e., the
18 creation of new information, new aesthetic, new insights and
19 understanding; (2) new expression, meaning, or message in the
20 original work, i.e., the addition of value to the original; and (3)
21 the use of quoted matter as raw material, instead of repackaging
22 it and merely superseding the objects of the original creation.”
23 [*Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443,
24 453 (9th Cir. 2020)] (citations and internal quotation marks
25 omitted).

26 *McGucken v. Pub Ocean Limited*, 42 F.4th 1149, 1161 (9th Cir. 2022).

27 Further, “[c]onsider the ‘purposes’ listed in the preamble paragraph of § 107:
28 ‘criticism, comment, news reporting, teaching ..., scholarship, or research.’ Although

1 the examples given are “‘illustrative and not limitative,’” they reflect ‘the sorts of
2 copying that courts and Congress most commonly ha[ve] found to be fair uses,’ and
3 so may guide the first factor inquiry.” *Andy Warhol Foundation for the Visual Arts,*
4 *Inc. v. Goldsmith*, 598 U.S. 508, 528 (2023) (holding that use of an altered version of
5 a photograph for substantially the same purpose and for a commercial nature was not
6 fair use) (quoting *Campbell*, 510 U.S. at 577–578 and § 101)). “[T]he first factor
7 (which is just one factor in a larger analysis) asks ‘whether *and to what extent*’ the
8 use at issue has a purpose or character different from the original. *Campbell*, 510 U.S.
9 at 579, 114 S.Ct. 1164 (emphasis added). The larger the difference, the more likely
10 the first factor weighs in favor of fair use. The smaller the difference, the less likely.”
11 *Andy Warhol Foundation for the Visual Arts, Inc.*, 598 U.S. at 529.

12 In this case, the display of the Video was transformative because the Account
13 incorporated commentary about climate change and its significant impact, which was
14 the focus and purpose of the Instagram Post, as well as an ongoing educational topic
15 addressed on the Account. The Post was part of the Account’s ongoing efforts to
16 inform and educate the public about environmental issues including climate change
17 and states in part, “As climate change continues to heat up our oceans and air, storms
18 like Atlantic hurricanes will only become stronger and more destructive.” Compl.,
19 Ex. 2.

1 DiCaprio's use of the video does not merely supersede Plaintiff's purpose,
2 because the original Video did not address, refer to or mention climate change.
3 Plaintiff's stated purpose in creating the Video was simply to "show[] a helicopter
4 view of the damage caused by Hurricane Dorian to the Abaco islands in the
5 Bahamas." Compl. 2.
6

7
8 Because the use of the CNN version of the Video was not commercial in nature
9 and it transformed the Video into an example of the increasing effects of climate
10 change, this first factor weighs heavily in favor of a finding of fair use.
11

12 **B. The Nature of the Video is Informational and It Was Previously**
13 **Published**

14 The second fair use factor looks to the nature of the plaintiff's work. 17 U.S.C.
15 § 107(2). In assessing the copyrighted work's nature, we consider "the extent to
16 which it is creative and whether it is unpublished." *McGucken*, 42 F.4th at 1161
17 (*citing Monge v. Maya Mags.*, 688 F.3d 1164, 1177 (9th Cir. 2012)). "Works that are
18 creative in nature are closer to the core of intended copyright protection than are
19 more fact-based works. However, whether a work is published or unpublished is a
20 critical element of its nature, and '[p]ublished works are more likely to qualify as fair
21 use because the first appearance of the artist's expression has already occurred.'" *Kelly*, 336 F.3d at 820 (*citing A & M Records*, 239 F.3d 1004, 1016 9th Cir. 2000;
22 *Campbell*, 510 U.S. at 586) (internal quotation marks omitted)).
23
24
25
26
27
28

1 Here, the Video is not creative in nature. It is simply a video showing a
2 helicopter view of the damage caused by Hurricane Dorian to the Abaco islands in
3 the Bahamas. Compl. 1. Plaintiff exaggerates the creative efforts involved in making
4 the Video, asserting that Clement personally selected the subject matter, timing,
5 lighting, angle, perspective, depth, lens and camera equipment used to capture the
6 video recording. Compl. 1, 3. Everyone who take a photograph or video must make
7 those basic decisions to some degree, and that does not, without more, demonstrate
8 any particular level of creativity.
9

10
11
12 Indeed, it is apparent from Plaintiff's allegations and the Exhibits to the
13 Complaint showing images that the Video was much more informational than
14 creative. The Video was taken after a hurricane of the damage it caused, from the air
15 in a helicopter, which necessarily would limit most choices as to the angle,
16 perspective, depth and lighting of the Video. Indeed, the video conveys factual
17 information (i.e., what Great Abaco Island looked like after the hurricane hit), not art.
18 This factor therefore weighs in favor of a finding of fair use. *See, e.g., City of*
19 *Inglewood*, 2015 WL 5025839 at *9–10 (granting motion to dismiss).
20
21

22
23 Further impacting this second factor is whether the Video had been published
24 before it was displayed in the Post. Exhibit 2 of the Complaint reflects that the Video
25 had been previously published by CNN on CNN's highly followed Instagram
26 account, before it was displayed in the Post. Because the Video is much more
27
28

1 informational than creative, and it had been published before any version was used in
2 the Post, this factor weighs in favor of a finding of fair use.

3
4 **C. The Portion of the Work Used in Was Justified and Necessary for**
5 **the Purpose of the Use**

6 “The third factor asks whether the amount and substantiality of the portion
7 used in relation to the copyrighted work as a whole ... are reasonable in relation to the
8 purpose of the copying.” 17 U.S.C. § 107(3). The Ninth Circuit has held that the
9 reuse of an entire image may be reasonable if it serves the defendant's intended
10 purpose. See *Perfect 10, Inc.*, 508 F.3d at 1167 (use of entire image necessary to
11 facilitate use of search engine).

12
13
14 To evaluate the third factor requires comparing the amount of the work used to
15 the purpose of the copying. See *Campbell*, 510 U.S. at 586-587. “While wholesale
16 copying does not preclude fair use per se, copying an entire work militates against a
17 finding of fair use.” *Kelly*, 336 F.3d at 820 (internal quotation marks omitted).
18 “However, the extent of permissible copying varies with the purpose and character of
19 the use. If the secondary user only copies as much as is necessary for [its] intended
20 use, then this factor will not weigh against [it].” *Id.* at 820–21; *American Society of*
21 *Cinematographers*, 2021 WL 4352302, at *4. “This factor circles back to the first
22 factor because ‘the extent of permissible copying varies with the purpose and
23 character of the use.’” *Dr. Seuss*, 983 F.3d 443, 456 (9th Cir. 2020) (quoting
24 *Campbell*, 510 U.S. at 586–87).

1 Here, Plaintiff alleges that the entire Video was used. As explained above, the
2 first factor weighs in favor of fair use because the Video was used for a different
3 purpose than that for which it was taken; the Post was intended to instill an
4 understanding of the effects of climate change, as demonstrated by the damage
5 caused by one hurricane, a transformative purpose that was best expressed and would
6 make the largest impact by reproducing the entirety of the video published by CNN,
7 showing the full extent of the destruction. Accordingly, this factor weighs in favor of
8 fair use.
9

10
11
12 **D. There Has Been No Alleged or Likely Effect of the Use on the**
13 **Potential Market for or Value of the Video**

14 The fourth and final factor is “the effect of the use upon the potential market
15 for or value of the copyrighted work.” 17 U.S.C. § 107(4). Evaluation of this factor
16 considers both the extent of the market harm caused by the alleged infringer's
17 conduct and the adverse impact on the potential market for the original if this conduct
18 were unrestricted and widespread. *Campbell*, 510 U.S. at 590.
19

20 There are no facts in the Complaint showing that the market for the Video was
21 or was likely to be negatively impacted. *See Savage v. Council on American-Islamic*
22 *Relations, Inc.*, C 07-6076 SI, 2008 WL 2951281, *9 (N.D. Cal. Jul. 25, 2008)
23 (dismissing copyright claim on a motion for judgment on the pleadings where
24 plaintiff failed to allege an impact on the actual or potential sale, marketability or
25 demand for the original copyrighted work). Significantly, there are no allegations as
26
27
28

1 to any attempts to sell or license the Video, nor any material facts supporting any
2 effect on the market for the Video whatsoever. The Complaint does not contain any
3 explanation as to how the Post has affected the market for or value of the Video,
4 undoubtedly because, if anything, interest in the Video would have been significantly
5 increased by reason of it being exposed to DiCaprio's Instagram followers.
6

7
8 Further, the Post did not use the original Video, but a version from the CNN
9 Instagram account, which had previously used the Video in a news story specifically
10 about Hurricane Dorian. The Video apparently had been licensed to news outlet CNN
11 to report immediately on storm damage, as evident by the CNN logo on the version
12 of the Video seen on the Account, and the prior publication demonstrates the Video's
13 most likely potential market, if any remained: to be part of a story by a news outlet, a
14 documentary or film or television series. Further, presumably anyone who wanted to
15 use the Video for a commercial purpose would need to obtain a copy that did not
16 contain CNN's logo. That would require them to seek out the owner of the original
17 Video, who was identified on the CNN version of the Video.
18
19
20

21 In contrast, the purpose of the Post was to educate people about climate change
22 and to incite changes in behavior or policy, not to sell any product or the Video itself.
23

24 Accordingly, this factor weighs in favor of a determination of fair use.
25
26
27
28

1 **V. CONCLUSION**

2 DiCaprio has established that the use of the Video in the subject Instagram Post
3 constituted fair use under 17 U.S.C. § 107, because (1) use of the Video was for
4 nonprofit education purposes and transformed the character of the Video; (2) the
5 nature of the Video is informational, and it was previously published; (3) the portion
6 of the work used in was justified and necessary for the purpose of the use; and (4)
7 there has been no alleged or likely effect of the use on the potential market for or
8 value of the Video.
9

10 For these reasons, DiCaprio respectfully requests that the Court grant this
11 Motion to Dismiss Plaintiff's Complaint.
12
13
14
15

16 Dated: October 14, 2024

By: /s/ Robert M. Barta

17 Robert M. Barta, Esq.
18 BARTA | GOLDBERG
19 1801 Century Park East, Suite 1200
20 Los Angeles, CA 90067
21 T: 310-479-1454
22 F: 310-478-1439
23 rbarta@bartagoldberg.com
24
25
26
27
28

CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendant Leonardo DiCaprio, certifies that this brief contains 4,208 words, which complies with the word limit of L.R. 11-6.1.

/s/ Robert M. Barta

Robert M. Barta

CERTIFICATE OF SERVICE

On October 14, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Central District of California, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5 (b)(2).

/s/ Robert M. Barta

Robert M. Barta